

**A                      Public Prosecutor v Ramanathan a/l Chelliah**

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO  
W-09-4 OF 2005

**B**                      ZAINUN ALI, ABU SAMAH AND SULONG MATJERAIE JJCA  
11 JULY 2008

**C**                      *Criminal Procedure — Appeal — Delay in preparing and providing grounds of judgment — Whether delay led to serious miscarriage of justice — Whether delay resulted in blunting of trial judge's observation especially with regard to demeanour of witnesses — Criminal Procedure Code s 271*

**D**                      *Evidence — Burden of proof — Close of prosecution case — Maximum evaluation of prosecution evidence — Whether trial judge erred in applying wrong legal burden of proof, thus occasioning failure of justice*

**E**                      The trial of this case ended on 8 October 1996 but the trial judge's decision, which required reference to copious notes that were recorded and maintained in the course of a lengthy proceeding, was only delivered on 8 November 1996 ie three weeks after the close of the case. Thereafter, the trial judge only prepared and provided the grounds of judgment five years later. The respondent appealed to the High Court that the delay in preparing and supplying the grounds of judgment had caused prejudice to him and occasioned a miscarriage of justice. It was the respondent's contention that the trial judge had failed to make remarks or observations of the witnesses' demeanour which the trial judge is permitted to do under s 271 of the Criminal Procedure Code ('the CPC') and that this had resulted in prejudice in the latter making a properly evaluated finding. The respondent further submitted that the trial judge had applied a prima facie standard of proof that was no longer good law and that this had amounted to a serious misdirection which vitiated the entire proceeding. The High Court in its appellate capacity found that the delay in the writing of the grounds of judgment had resulted in the blunting of the trial judge's observation especially with regard to the demeanour of the witnesses leading to a misdirection on the part of the trial judge. The High Court also found that the trial judge had erred in applying the wrong legal burden of proof, thus occasioning a failure of justice. This was the appeal against that decision. The main issue before the court was whether there was a serious miscarriage of justice occasioned by the delay in the delivering of the grounds of judgment by the trial judge.

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**Held**, allowing the appeal:

- (1) A scrutiny of the trial judge's detailed notes of proceedings showed that the trial judge had scrupulously recorded her observations and made remarks of the witnesses as the trial unfolded. These contemporaneous observations of the material witnesses as to their demeanour and circumstances in determining their credibility left little room for the respondent to contend that the trial judge's assessment would be less than accurate or that her observation was blurred or blunted by the passage of time. Thus, both the High Court judge's and the respondent's contention that s 271 of the CPC had not been complied with in this respect did not hold any ground since the utility of s 271 is in itself, discretionary. Thus, unfairness and prejudice in this regard had not been successfully established (see paras 5 & 7).
- (2) Although the delay in preparing and supplying grounds of judgment is a malaise that must be resisted, a distinction must be made between delay in delivering decisions and delay in providing grounds of judgment. If there is a long delay in giving a decision after the close of the case, then it may be acceptable that this could cause prejudice to the accused person and a miscarriage of justice may result. However, as in this case if the decision had been delivered within a reasonable period but the grounds of judgment was prepared and provided some five years later the prejudice could not be as immense unless it could be clearly shown that there was unfairness and clear jeopardy (see paras 8, 9).
- (3) The trial judge invoked the then s 173(f) of the CPC where the language of 'if unrebutted warrants a conviction' had been found to it being a 'beyond reasonable doubt' standard of proof after a maximum evaluation of the prosecution evidence. Thus, the trial judge by undertaking not a minimum but a maximum evaluation of the evidence at the close of the prosecution's case had applied the correct standard of proof and had not misdirected herself (see paras 7, 11 & 15).

**[Bahasa Malaysia summary]**

Perbicaraan kes ini berakhir pada 8 Oktober 1996 tetapi keputusan hakim perbicaraan, yang memerlukan rujukan kepada nota-nota salinan yang direkod dan diselenggara sepanjang tempoh prosiding yang panjang, hanya disampaikan pada 8 November 1996 iaitu tiga minggu selepas penutupan kes tersebut. Oleh itu, hakim perbicaraan hanya menyediakan dan memberi alasan penghakiman lima tahun kemudian. Responden merayu di Mahkamah Tinggi bahawa kelewatan dalam menyediakan dan memberikan alasan penghakiman telah menyebabkan prejudis ke atasnya dan mewujudkan ketidakadilan. Ia adalah hujah responden bahawa hakim perbicaraan telah gagal untuk membuat kenyataan atau pemerhatian

- A terhadap tingkah laku saksi-saksi di mana hakim perbicaraan adalah dibenarkan berbuat demikian di bawah s 271 Kanun Prosedur Jenayah ('KPJ') dan ini telah menyebabkan prejudis ke atas hakim perbicaraan dalam membuat penemuan yang ditaksir secara betul. Responden seterusnya berhujah bahawa hakim perbicaraan memohon satu standard pembuktian
- B prima facie yang bukan lagi undang-undang yang baik dan bahawa ini merupakan salah arah yang serius yang merosakkan keseluruhan prosiding. Mahkamah Tinggi di dalam kapasiti rayuan mendapati bahawa kelewatan di dalam menulis alasan penghakiman telah mengakibatkan kelemahan pemerhatian hakim perbicaraan terutamanya yang melibatkan tingkah laku
- C saksi-saksi yang menyebabkan salah arah di pihak hakim perbicaraan. Mahkamah Tinggi juga mendapati bahawa hakim perbicaraan terkhilaf dalam menggunakan beban pembuktian undang-undang yang silap, menyebabkan kegagalan keadilan. Ini adalah rayuan terhadap keputusan tersebut. Isu utama di mahkamah adalah sama ada terdapat ketidakadilan
- D yang serius yang disebabkan oleh kelewatan dalam mengeluarkan alasan penghakiman oleh hakim perbicaraan.
- E **Diputuskan**, membenarkan rayuan:
- (1) Penelitian terhadap nota-nota prosiding terperinci oleh hakim perbicaraan menunjukkan bahawa hakim perbicaraan telah secara prihatin merekod pemerhatian beliau dan membuat kenyataan mengenai saksi-saksi semasa perbicaraan. Pemerhatian pada masa yang
- F sama terhadap saksi material terhadap tingkahlaku mereka dan keadaan di dalam menentukan kredibiliti mereka meninggalkan ruang yang kecil untuk responden berhujah bahawa penilaian hakim perbicaraan menjadi kurang tepat atau bahawa pemerhatian beliau adalah kabur atau dilemahkan oleh laluan masa. Oleh itu, hujahan kedua-dua hakim
- G Mahkamah Tinggi dan responden bahawa s 271 KPJ tidak dipatuhi di dalam perkara ini tidak berasas memandangkan kegunaan s 271 dengan sendirinya adalah budi bicara. Oleh itu, ketidakadilan dan prejudis di dalam perkara ini tidak dibuktikan dengan jayanya (lihat perenggan 5 & 7).
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- (2) Walaupun kelewatan di dalam menyediakan dan membekalkan alasan penghakiman adalah ketidakpuasan yang mesti dihindari, perbezaan mesti dibuat di antara kelewatan di dalam menyampaikan keputusan dan kelewatan di dalam memberikan alasan penghakiman. Jika terdapat
- I kelewatan yang berlanjutan di dalam memberikan keputusan selepas akhir kes, dengan itu ia boleh diterima bahawa ini boleh menyebabkan prejudis kepada tertuduh dan ketidakadilan boleh terjadi. Walau bagaimanapun, seperti dalam kes ini jika keputusan telah disampaikan dalam tempoh masa yang munasabah tetapi alasan penghakiman telah

disediakan dan diberikan lima tahun kemudian, prejudis tidak menjadi terlalu besar kecuali ia dapat ditunjukkan dengan jelas bahawa terdapat ketidakadilan dan jelas berisiko (see perenggan 8, 9).

- (3) Hakim perbicaraan membangkitkan s 173(f) KPJ pada masa itu di mana bahasa 'if unrebutted warrants a conviction' telah didapati terhadapnya sebagai standard pembuktian 'melampaui keraguan yang munasabah' selepas penilaian maksimum keterangan pendakwaan. Oleh itu, hakim perbicaraan dengan usaha yang bukan minimum tetapi maksimum penilaian keterangan di akhir kes pendakwaan telah mengaplikasi standard pembuktian yang betul dan tidak tersalah arah dirinya (lihat perenggan 7, 11 & 15).]

#### Notes

For cases on appeal in general, see 5 (2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 139–752.

For cases on burden of proof in general, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) 7(2) paras 303–598.

#### Cases referred to

- Arulpragasam a/l Sandaraju v PP* [1997] 1 MLJ 1, FC (refd)  
*Balachandran v PP* [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)  
*Jai bin Adam @ Zainuddin bin Adam v PP* [1995] MLJU 550; [1996] 1 CLJ 482, HC (refd)  
*Khoo Hi Chiang v PP and another appeal* [1994] 1 MLJ 265, SC (refd)  
*Looi Kow Chai v PP* [2003] 2 MLJ 65, CA (refd)  
*Tan Boon Kean v PP* [1995] 3 MLJ 514, FC (refd)  
*Tan Hun Wah v PP and another appeal* [1994] 1 MLJ 382, SC (refd)  
*Tara Singh Sidhu and ors v PP* [1949] MLJ 88, HC (refd)  
*TN Nathan v PP* [1978] MLJ 134, HC (refd)  
*Voon Chin Fatt v PP* [1948–1949] MLJ Supp 131, CA (refd)

#### Legislation referred to

Criminal Procedure Code ss 173(f), 271, 422

- Jambirah bt Ali (Eddie Yeo with her) (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.*  
*Karpal Singh (Ramkarpal Singh & Sangeet Kaur with him) (Karpal Singh & Co) for the respondent.*

#### Zainun Ali JCA:

[1] After having heard submission of parties we allowed the appeal, set aside the High Court decision and affirmed the decision of the trial judge. Our grounds are as follows.

- A [2] We find that delay in providing grounds of judgment by the trial judge will not per se, vitiate its decision (*Tan Hun Wah v Public Prosecutor and another appeal* [1994] 1 MLJ 382; *Voon Chin Fatt v Public Prosecutor* [1948–1949] MLJ Supp 131; *TN Nathan v Public Prosecutor* [1978] MLJ 134).
- B [3] The question before us is this: Is there miscarriage of justice in this appeal?
- C (a) The learned High Court judge in his appellate capacity, found that ‘such a long delay in writing his judgment could indeed blur a judge’s decision especially in coming to a conclusion based on the credibility of witnesses, which includes their performance in the witness box, their demeanor et al, which forms the foundation of making a properly evaluated finding’.
- D The learned High Court judge found that the trial judge had failed to make remarks or observations of the witnesses’s demeanour which the trial judge is permitted to do under s 271 of the Criminal Procedure Code.
- E The trial judge found that after a protracted delay there is every likelihood of prejudice of mistake when considering their credibility. In fact he said, an observation of witnesses credibility made too long after the trial should be of little or no weight.
- (b) We scrutinised four relevant documents closely ie:
- F (i) the notes of proceedings;
- (ii) the decision of the learned trial judge;
- (iii) the judgment of the trial judge; and
- G (iv) the judgment of the High Court judge.
- (c) Contrary to his finding that ‘there was nothing mentioned in the notes of evidence on the trial judge’s observation on the demeanour of the witnesses’, we find that the trial judge’s notes are replete with them. In fact the learned High Court judge seemed to have contradicted himself as clearly seen at p 5 of his grounds of judgment.
- H (d) Our own scrutiny of the trial judge’s detailed notes of proceedings clearly manifested careful appraisal by the said judge of the material witnesses as to their demeanour and circumstances in determining
- I their credibility.

- (e) For instance the trial judge reminded the accused no less than three times (at pp 313, 354 and 413 of the notes of proceedings) on the need to be cautious in his testimony when it appeared that his testimony seemed contradictory. A
- The trial judge accepted the evidence of SP1 as a witness of truth and observed that SP2 is both honest and reticent. The trial judge also rejected the evidence of defendant witnesses that of SB2, SB3 and SB6 based on their credibility. B
- (f) Clearly the trial judge formed her impression of the witnesses whose evidence were tested critically against the totality of their evidence, *Tara Singh Sidhu v Public Prosecutor* [1949] MLJ 88. We are satisfied that the trial judge had scrupulously recorded her observations and made remarks of the witnesses as the trial unfolded. These remarks and observations were made contemporaneously. This therefore leaves little room for contending that the trial judge's assessment would be less than accurate or that her observation was blurred or blunted by the passage of time. C
- Thus both the learned High Court judge's and the respondent's contention that s 271 of the Criminal Procedure Code had not been complied with in this respect does not hold any ground here, since the utility of s 271 is in itself, discretionary. D
- (g) Delay per se in preparing the grounds of judgment in this appeal would not prejudice the respondent, since the trial judge had analysed the evidence and considered the demeanour and credibility of the main witnesses as clearly evidenced in the notes of proceeding. Clearly, unfairness and prejudice in this regard, had not been sufficiently established (see *Jai bin Adam @ Zainuddin bin Adam v Public Prosecutor* [1995] MLJU 550; [1996] 1 CLJ 482). E
- (h) Unquestionably, we find that the issue raised as to the demeanour and credibility of witnesses had been given due consideration by the trial judge. The learned High Court judge had fallen into error in finding otherwise. F
- (i) On the question of standard of proof applied by the trial judge which found disfavour by the learned High Court judge, it is our view upon scrutinising the notes of proceedings, that the trial judge had applied the correct standard of proof at the end of the prosecution case. The trial judge invoked the then s 173(f) of the Criminal Procedure Code where the language of 'if unrebutted warrants a conviction' had been found to it being a 'beyond reasonable doubt' standard of proof (*Khoo Hi Chiang v Public Prosecutor* [1994] 1 MLJ 265) after a maximum evaluation of the prosecution evidence. G
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- A (j) The respondent's ground of appeal on this issue was that the trial judge expressed in her grounds of judgment five (5) years later, that the standard of proof adopted at the close of the prosecution case was the test laid down in the case of *Tan Boon Kean v Public Prosecutor* [1995] 3 MLJ 514, that of 'prima facie' standard, which the
- B respondent alleged, departed from the principle laid down in *Khoo Hi Chiang*. The respondent submitted that, in 1997 the Federal Court in *Arulpragasam all Sandaraju v Public Prosecutor* [1997] 1 MLJ 1 restored the test as that laid down in *Khoo Hi Chiang*, which means that when the trial judge applied the test in 2001 in her
- C grounds of judgment, using *Tan Boon Kean* (prima facie standard of proof), the standard of proof used was no longer good law.
- (k) The respondent went on to state that this gross confusion on the trial judge's part amounted to a serious misdirection which vitiated the
- D entire proceeding. The respondent argued that the misdirection was so serious, it was incapable of being cured under s 422 of the Criminal Procedure Code. The learned High Court judge agreed with the respondent on the argument that the trial judge had used an incorrect standard of proof which she applied five (5) years after the trial in evaluating the prosecution witnesses which is not curable under s 422 of the Criminal Procedure Code. The learned High Court judge found that the delay in writing the grounds of judgment, had resulted in the blunting of the trial judge's observation leading to misdirection on the part of the trial judge.
- E The High Court also found that the trial judge had erred in applying the wrong legal burden of proof, thus occasioning a failure of justice.
- F We are conscious that the trial judge's decision was delivered on 8 November 1996 ie about three (3) weeks after a lengthy proceeding which ended on 8 October 1996 and copious notes were recorded and maintained, including remarks and observations. The facts and evidence were still very much alive in the mind of the trial judge when she delivered her decision three weeks after the close of the case.
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- H (l) On this point we would like to make an observation. Make no mistake that we are unanimous in our view that delay in preparing and supplying grounds of judgment in itself is a malaise that must be resisted as far as possible. It is an aberration much to be abhorred. However, a distinction must be made between delay in delivering decisions and delay in providing grounds of judgment.
- I If there is a long delay in giving a decision after the close of the case, then it may be acceptable that this could cause prejudice to the accused person and miscarriage of justice may be occasioned. If on the other hand, a decision had been made and delivered soon or

within a reasonable period after the close of the case (as happened in this appeal), *BUT* the grounds of judgment was only prepared and provided at a much later date such as five (5) years later as in this case, the prejudice could not be as immense or as stark unless it can clearly be shown there is unfairness and clear jeopardy. In this appeal, the respondent could not have shown these. In any case, he was out on bail and was not languishing behind bars waiting for his appeal to be heard.

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- (m) On the question of the standard of proof, our view is simply this. Though the majority decision in *Arulpragasam* held that the test at the close of the prosecution's case was beyond reasonable doubt which means a maximum evaluation of evidence should be undertaken by the court, the decision in *Tan Boon Kean* went the other way. It stood for the 'prima facie test'.

C

However it must be noted that the Federal Court in *Tan Boon Kean* agreed with the principle established in *Khoo Hi Chiang* that the quantum of proof at the close of the prosecution's case is based on the maximum evaluation of evidence.

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The terminology may differ, but both the majority and minority were united on the point that the court must undertake a maximum evaluation of evidence at the close of the prosecution's case.

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This observation is manifested in *Looi Kow Chai v Public Prosecutor* [2003] 2 MLJ 65. And again in the Federal Court case of *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85, the maximum evaluation test was applied. Augustine Paul FCJ speaking for the Federal Court held that at the close of the prosecution's case, the court must undertake a positive evaluation of the credibility and reliability of all evidence adduced by the prosecution.

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[4] In view of the above, the trial judge in this appeal had, in our view, applied the correct standard of proof in following the case of *Tan Boon Kean* (in her grounds of judgment). Even if she had referred and followed the standard determined by *Khoo Hi Chiang* based on the above analysis, the trial judge applied the same standard of proof, ie maximum evaluation of the evidence since the difference between the standard of proof in both *Tan Boon Kean* and *Khoo Hi Chiang* is basically a difference in semantics. The importance lies in its quantum which in both, are the same.

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[5] Thus, in our view the trial judge in applying the correct standard of proof at the end of the prosecution's case had not misdirected herself.

- A [6] In this regard, we failed to see where lies the prejudice or unfairness vis-a-vis the respondent since the trial judge had undertaken not a minimum but a maximum evaluation of the evidence at the close of the prosecution's case.
- B [7] We also found that the findings of the sessions court judge which had been alluded to earlier, where she accepted the evidence of material witnesses, SP1 and SP2 and that the ingredients of the offence with which the respondent had been charged, was successfully proven by the prosecution (see pp 619–624 and 664 of the AR and p 621 of the AR) were correct and proper. We find no misdirection of the facts and evidence on the part of the trial judge.
- C
- D [8] A proper findings of facts and the application of the correct legal principles by the trial judge, clearly seen in the 95 over pages of the grounds of judgment, ought not be disturbed. In view of the above, we therefore find no good reason for appellate intervention, much less order a retrial for hearing this appeal on its merits as proposed by the respondent.
- E [9] We are unanimous in allowing this appeal. The decision of the learned High Court judge is hereby set aside. The decision of the trial judge is hereby affirmed. The sentence imposed by the trial judge is reinstated.
- F [10] The respondent must now serve his sentence as imposed by the trial judge, forthwith.
- G [11] My learned brothers Sulong Matjeraie JCA and Abu Samah Nordin JCA have seen this judgment and have agreed that it be the judgment of the court.
- Appeal allowed.*

Reported by K Nesan

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